

## EU: Corporate Restructuring To Become More Complex

*Monday, Feb 25, 2008* --- On Feb. 20, the European Commission finally published its long-awaited consultation paper on the revision of the European Works Council Directive (EWCD). The Commission has now formally invited the European social partners – BusinessEurope for the employers, the European Trade Union Confederation (ETUC) for the trade unions - to submit their opinion on the Commission’s proposals within the next six weeks.

Alternatively, the employers and the unions can agree to negotiate an agreement to update the Directive. Upon agreement, they would then request the European Commission to arrange for their agreement to be given the force of law.

To understand what the EWCD involves and how it has impacted on multinational companies over the last 14 years, see our previous article in Employment Law360 on Jan. 14.

### *What Has The Commission Actually Proposed?*

The formal consultation document poses the questions we identified in our previous article on how the new laws might be written.

Following sharp criticism from employer bodies, the paper now does so in a way that leaves open, to some degree, how the problems they identify might be tackled.

While this offers increased scope for employers to influence over the eventual outcome, the general policy orientation of increasing the powers of EWCs and deepening trade union involvement remains the same.

The consultation paper suggests revising the EWC Directive in six areas:

Providing a clearer and more demanding definition of what is meant by European-level employee information and consultation;

Redefining “transnational issues”;

Rewriting the “subsidiary requirements”;

Giving trade unions an explicit role in the work of EWCs;

Broadening the areas over which EWC’s have competence; and

Introducing provisions governing the status and role of EWC’s in the event of

mergers or takeovers.

In its final paragraphs, the consultation document raises a new issue that will cause concern to many companies in the U.S. Approximately one-half of the 820 EWC agreements in place today (many of them American) are agreements concluded before the Directive came into legal force in September 1996, and are currently deemed automatically compliant with the law.

They are seen by many companies as being more flexible than EWC agreements negotiated after 1996 within the framework of the Directive. It is clear that both the Commission and the trade unions consider many of these agreements to be inadequate and in need of renegotiation.

On this issue, the Commission suggests that only those European works councils which operate to the satisfaction of the parties should be able to continue.

The clear implication is that these agreements should be subject to renegotiation and revision if employee representatives believe they could get a better deal in the light of the legal changes described below.

### *The Definition Of Information And Consultation*

The existing 1994 EWCD has no definition of “information.” Consultation is defined as “an exchange of views and the establishment of dialogue” between employees’ representatives and central management.

Most multinational companies have interpreted this as having an annual conversation with employees’ representatives about corporate results and prospects. Only in exceptional circumstances involving major job losses have matters gone beyond this.

In the view of the Commission, updating the definition of the concepts of information and consultation means following the lead set by more recent European laws which suggest that consultation should be “with a view to reaching an agreement.” This means including the concepts of appropriate timing, means, and content.

It is clear that consultation processes should allow employee representatives to present their views to management and to receive a formal response from the company on their views. The proposals suggest that “information and consultation procedures shall be established and implemented (...) so as to ensure their effectiveness.”

Additionally, the Commission wants any revised Directive to establish an explicit link between European-level and national-level information and consultation processes.

It leaves open how this should be done, but it is clear to most companies that

linking national and transnational/international consultation will only cause confusion, conflict and delay.

## *What Is A “Transnational” Issue?*

EWCs were set up to deal with transnational issues. Exclusively, national issues fall under the scope of national employee representative bodies - normally works councils or trade unions. Currently, transnational issues are defined as issues involving employees in at least two different EU member states.

The Commission suggests that transnational issues should include those matters “going beyond the powers of decision-making bodies in a single Member State.”

Such a definition would mean that practically any issue of substance in a non-EU based company would be seen as a transnational issue, and hence be subject to exceptional consultation with the EWC in addition to national bodies.

This may be likened to the expansive definition of “interstate commerce” under the National Labor Relations Act in U.S. law.

## *Rewrite The “Subsidiary Requirements”*

The “subsidiary requirements” are the fallback rules that apply when employees’ representatives and central management cannot reach agreement on an EWC constitution. There are very few EWC’s that operate under these requirements and their importance lies in the benchmark they set for voluntary EWC negotiations.

At the moment, the subsidiary requirements basically call for one EWC meeting a year with additional meetings in “exceptional circumstances” - defined as corporate decisions having an adverse impact on employees in at least two or more member states.

The Commission now wants to rewrite these rules so as to provide for:

Two meetings per year instead of one;

Expansion of the definition of “exceptional circumstances” where additional meetings should be held – for example the new definition of “transnational issues”;

Give EWC’s the right to at least 2 meetings in “exceptional circumstances”. The second meeting would be to “seek an agreement” or negotiate with management on their proposals;

Expand the agenda of EWC meetings to include “changes in responsibilities, mobility, health and safety at work, work organization and the environment.”

## *Trade Unions And EWCs*

The 1994 EWCD says that EWCs can be assisted by “an expert of their choice” whose costs are paid by management. There is no explicit mention of trade unions in the Directive. The new proposal is that trade unions should be able to play a role “in negotiations and support of European works councils.”

It is not clear whether the involvement of trade unions would be at the invitation of the employees’ representatives on an EWC, or whether they could become involved as of right. The consultation document suggests that this approach will help trade unions establish EWC’s in the 1,400 companies within scope but currently without EWC arrangements, implying that they would have a right to make an independent request to companies in which they have members to set up an EWC.

## *Expand The Competencies Of EWC Members*

The Commission wants EWC members to have the right to be trained in their role. This is one of the less contentious issues in the consultation paper.

Of more concern is the proposal that there should be “an obligation for European works council members to report to the workers they are representing.” This begs the question as to how they are to do this.

The trade union position will be that representatives should be allowed to visit all the sites in the country they represent. In this context it is easy to see how EWC members could become close to full-time European-level employee representatives, paid of course by the employer.

## *Dealing With Mergers Or Takeovers*

The 1994 EWCD is silent on what is to happen to EWCs in the event of mergers or takeovers. If company A takes over company B and both have EWCs, does the EWC of company B disappear and, if so, at what point in time? How then are the employees of company B to be represented?

Alternatively, should the two EWCs negotiate a merger? The Commission wants all EWC agreements to contain language specifying what will happen when companies merge or when there is a takeover, and it suggests the provision of minimum guarantees for employees in the affected companies in the event of a failure to reach agreement.

## *What Happens Next?*

BusinessEurope and the ETUC have six weeks from Feb. 20 to respond to the Commission. Within that time they can agree to commence negotiations to reach an agreement to revise the Directive. If they decide to negotiate, the Commission will suspend the legislative process and the employers and

unions have nine months to negotiate an agreement.

If they reach agreement they can ask the EU Commission to request the Council of Ministers and the EU Parliament to give the agreement the force of law. In this scenario, the EWC Directive will be revised by the end of 2008.

If the social partners cannot agree on a basis for negotiations or, if having opened negotiations they are unable to reach agreement, the Commission moves the issue into the legislative channels which means seeking the consent of both the Council of Ministers and the European Parliament to amend the Directive.

How long this would take is an open question; although it seems certain that the issue will be pushed hard by the French presidency of the Council of Ministers in the latter half of this year.

### *The End Result Will Be Change*

The EWC Directive will be changed. The only questions that remain are: how much will it be changed and how fast?

Taken as a package, the Commission's proposals will mean:

The numbers of EWC meetings will expand exponentially;

In qualitative terms, EWC's will become genuine European-level bargaining bodies, able to press employers to consult "with a view to reaching an agreement" on substantial changes in work organization or employment contracts;

Trade unions will be given a formal right to participate in current EWC's and to trigger new ones.

Corporate restructuring in Europe is about to become more time-consuming and difficult.

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